

⁷ See *Post v. Bradshaw*, 422 F.3d 419 (6th Cir. 2005).

A Rule 60 motion is in substance a § 2254 petition when it asserts a “claim” for relief from the prisoner’s state conviction.⁸ For example, a prisoner asserts a “claim” for relief when he (1) attempts to assert new grounds for relief that was not asserted in a earlier § 2254 petition, (2) seeks to present new evidence to support an argument that was asserted in an earlier petition, or (3) “attacks the federal [habeas] court’s previous resolution of a claim *on the merits*.”⁹

A motion is a true Rule 60(b)(6) motion if it instead “attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.”¹⁰ For instance, Rule 60 is a proper vehicle to challenge “a determination that a claim was time-barred or procedurally defaulted.”¹¹

It follows that, to the extent that Coley now seeks to assert new claims that were not presented in his original § 2254 petition, he asks this Court to authorize him to file a second or successive § 2254 petition. But this Court has no authority to do that; Coley must instead seek permission from the Sixth Circuit.¹² Likewise, to the extent that Coley has discovered new evidence or developed new legal theories in support of his original § 2254 claims, his motion must be directed to the Sixth Circuit.¹³

Finally, Coley’s motion does challenge this Court’s determination that several of the claims in his original § 2254 petition were procedurally defaulted.¹⁴ This Court based its procedural default finding on Coley’s failure to earlier-exhaust his state court remedies in state court.¹⁵ He now claims that he failed to raise some or all of those claims only because his State post-conviction

⁸ *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

⁹ *Id.* at 531–32 (emphasis in original).

¹⁰ *Id.* at 532.

¹¹ *Sheppard v. Robinson*, 807 F.3d 815, 819 (6th Cir. 2015).

¹² 28 U.S.C. § 2244(b)(3)(A).

¹³ *Id.*

¹⁴ Doc. [113](#).

¹⁵ Doc. [92](#) at 34–38.

counsel abandoned him and failed to file a state-post conviction motion.¹⁶

Ordinarily, a challenge to the Court's earlier finding of procedural default would be a true Rule 60(b)(6) motion.¹⁷ However, this Court's earlier decision addressed the merits of nearly all of Coley's habeas claims notwithstanding his procedural default.¹⁸ As a result, his present motion is, in substance, an attempt to re-litigate § 2254 claims that this court has already addressed. And for that he would need permission from the Sixth Circuit.¹⁹

The Court acknowledges that the opinion denying Coley's petition for habeas relief does not appear to have addressed the merits of a few of his original claims.²⁰ And if Coley were still pursuing those unaddressed claims, Rule 60(b)(6) relief might be warranted.²¹ Coley's present motion, however, neither mentions those claims nor indicates that they are the basis for his request for relief.²²

For those reasons, the Court **GRANTS** the Warden's motion and **ORDERS** that Coley's motion be transferred to the Sixth Circuit for review under [28 U.S.C. § 2244\(b\)](#).

IT IS SO ORDERED.

Dated: November 29, 2017

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

¹⁶ *E.g.* Doc. [113](#) at 1–2.

¹⁷ *Sheppard*, 807 F.3d at 819.

¹⁸ Doc. [92](#) at 44–88. *Cf.* Bryan A. Garner et al., *The Law of Judicial Precedent* 122 (2016) (“It is blackletter law that ‘where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.’” (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949))).

¹⁹ See *Gonzales*, 545 U.S. at 532.

²⁰ Compare Docs. [81](#), [84](#) with Doc. [92](#).

²¹ See *Sheppard*, 807 F.3d at 819.

²² Doc. [113](#) at 18–19.